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No. 86-1562

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PAWTUXET COVE MARINA, INC., *et al.*,
Petitioners,

v.

CIBA-GEIGY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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RESPONDENT'S MEMORANDUM IN OPPOSITION

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QUESTIONS PRESENTED *

1. Whether plaintiffs are entitled to relitigate in this Court their view of the factual circumstances of their purported tort claims and federal claim, where that view was repeatedly rejected by the courts below as wholly unsupported.

2. Whether a citizen suit under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, will lie against a former industrial discharger where the former discharger is not and cannot be alleged to be "in violation" of an effluent standard or limitation contained in a permit that is "in effect" under the Clean Water Act.

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* These questions have been restated from those set out in the Petition.

PARTIES BELOW

Petitioners, who were plaintiffs in the District Court and appellants in the Court of Appeals, are Russell Hunt, Beverley Hunt, and Pawtuxet Cove Marina, Incorporated. Respondent, who was defendant in the District Court and appellee in the Court of Appeals, is CIBA-GEIGY Corporation.*

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* The following information is provided for purposes of Rule 28.1. The parent company of CIBA-GEIGY Corporation is CIBA-GEIGY International, Limited. CIBA-GEIGY Corporation's only subsidiary or affiliate (other than wholly-owned subsidiaries) is CIBA-Corning Diagnostics.

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RESPONDENT'S MEMORANDUM IN OPPOSITION

Respondent CIBA-GEIGY Corporation ("CIBA-GEIGY") opposes the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

Petitioners Pawtuxet Cove Marina, Inc., a defunct Rhode Island corporation, and Beverley and Russell Hunt, two of its former shareholders ("plaintiffs"), were the owners and operators of commercial marina properties on Pawtuxet Cove in Cranston, Rhode Island. For approximately three decades prior to the commencement of

this action, respondent CIBA-GEIGY, a New York corporation, operated a specialty chemical manufacturing facility in Cranston, Rhode Island. The plant discharged treated process wastewater into the Pawtuxet River pursuant to National Pollutant Discharge Elimination System ("NPDES") permit No. RI-0001171.

CIBA-GEIGY's permit expired by its own terms in July of 1983, and by August 1, 1983, CIBA-GEIGY had "tied in" its pretreated wastewater discharges to the Cranston municipal wastewater treatment plant and completely ceased direct process wastewater discharges from the Cranston plant.[1] During the pendency of this litigation, manufacturing operations at the Cranston plant were discontinued.

Notwithstanding the cessation of process wastewater discharges several months earlier, plaintiffs brought this action in November 1983 in the United States District Court for the District of Rhode Island. Plaintiffs alleged that certain past discharges from CIBA-GEIGY's Cranston manufacturing facility upstream had affected Pawtuxet Cove, damaging plaintiffs' marina business and rendering CIBA-GEIGY liable to them pursuant to federal and Rhode Island common law under a variety of theories including trespass, nuisance, negligence, strict liability, and "*res ipsa loquitor.*" Plaintiffs also alleged that past discharges had violated CIBA-GEIGYs NPDES permit, and sought the imposition of civil penalties under Section 505 of the Clean Water Act (which penalties plaintiffs erroneously contended would be payable to themselves).

Plaintiffs' initial Complaint was dismissed by the District Court, District Judge (now Circuit Judge) Bruce

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[1] The Cranston plant continued to discharge relatively small amounts of cooling water (tap water which did not come into contact with any process materials), which is not at issue in this action.

M. Selya presiding, on May 17, 1984, for failure to state a claim upon which relief may be granted. Leave was given to file an amended complaint for "enforcement of ongoing effluent standard violations (and civil penalties ancillary thereto, payable to the United States)" and for properly-pleaded state common law claims.[2] Plaintiffs filed an Amended Complaint in June 1984 but, because CIBA-GEIGY did not discharge process wastewater pursuant to an NPDES permit, plaintiffs remained unable to allege ongoing violations. On September 10, 1984, the District Court again dismissed the citizen suit count for failure to state a claim upon which relief may be granted, but approved the finding of a magistrate that the "bare essentials" of state common law claims had been alleged and permitted the action to go forward based on the diverse citizenship of the parties.[3]

Following extensive discovery, CIBA-GEIGY filed a motion for summary judgment as to the state common law claims, based on the absence of any issue of material

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[2] May 17, 1984 Memorandum and Order of the District Court, App. at 17. The District Court dismissed plaintiffs' claims under federal common law, a determination which the plaintiffs have not challenged.

[3] Plaintiffs moved for a reconsideration of the two dismissals of the citizen suit counts on January 24, 1985; the District Court denied that motion on June 7, 1985. App. at 18-21. Yet another motion to amend, this time with a complaint alleging unspecified ongoing violations based on two spill incidents, was filed in August of 1985. The District Court denied the motion to amend, on a variety of grounds. App. at 31. *See infra* at 7. Plaintiffs filed an objection to the ruling, which the District Court treated as another request for reconsideration of the citizen suit claim and denied on October 30, 1985. Plaintiffs then filed a premature appeal on the citizen suit issue to the United States Court of Appeals for the First Circuit, *Pawtuxet Cove Marina, Inc. v. CIBA-GEIGY Corp.*, No. 85-1940 (1st Cir. 1985), which was summarily dismissed by the Court of Appeals for want of jurisdiction on December 10, 1985, approximately two months before trial of the diversity claims commenced in the District Court.

fact respecting the role of CIBA-GEIGY's discharges in causing plaintiffs' injuries. As the District Court characterized it, the "gravamen of the plaintiffs' main claim" was that CIBA-GEIGY's discharges entered Pawtuxet Cove, thus adversely affecting public opinion regarding the disposal of dredging spoil from the Cove and thereby preventing dredging of the Cove.[4] The lack of dredging was asserted to have injured financially the plaintiffs' marina business, with attendant stress from the financial harm allegedly causing various physical ailments of the individual plaintiffs.

Judge Selya granted CIBA-GEIGY's motion in part, holding that "[t]he voluminous record in this case is entirely barren of any evidence (or even the hint of any evidence) from which a rational factfinder could deduce that pollution emanating from [CIBA-GEIGY's] factory proximately caused Pawtuxet Cove to remain undredged."[5] However, based on plaintiffs' assurances that the state common law claims had bases independent of the lack of dredging of the Cove, Judge Selya permitted plaintiffs to go to trial on the state law claims.

Trial began on February 3, 1986. After empanelment of a jury, a viewing of the marina and the CIBA-GEIGY plant site, and one and one-half days of testimony, plaintiffs admitted that all of the state common law claims were predicated on the failure to dredge Pawtuxet Cove, the issue which had been resolved in CIBA-GEIGY's favor on summary judgment. Plaintiffs submitted a Second Amended Complaint, specifying that all

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[4] September 19, 1985 Memorandum Decision of the District Court, App. at 25. The plaintiffs' Second Amended Complaint, which delimits the common law issues, alleged that the "lack of dredging . . . was the sole, direct and proximate cause of each and all of the losses, damages, injuries, and harm of which the plaintiffs complain in this action." App. at 35.

[5] September 19, 1985 Memorandum Decision of the District Court, App. at 26.

of the common law claims were based entirely on the dredging theory.[6] Judge Selya discharged the jury and entered complete summary judgment in favor of CIBA-GEIGY on the common law claims.

Plaintiffs appealed to the United States Court of Appeals for the First Circuit, contesting both the entry of summary judgment on the common law claims and the repeated dismissals of the citizen suit. The Court of Appeals, in an opinion delivered by Senior Circuit Judge Aldrich, agreed with the District Court that: (i) "as a matter of law on the overall record" CIBA-GEIGY's discharge "was an insignificant, and in no sense a 'but for' factor" in the failure to dredge Pawtuxet Cove, plaintiffs being left with "nothing but hope [which] was clearly insufficient to make out a case against defendant;"[7] and (ii) a citizen suit under Section 505 "may go forward if the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act." Because "[a]t the time plaintiffs brought suit . . . the defendant had ceased operating under [its] permit . . . [and] there was no reasonable likelihood that defendant's alleged infractions would continue," the Court of Appeals affirmed the District Court's dismissal of the action.[8] Plaintiffs subsequently petitioned this Court for a writ of *certiorari*.

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[6] *See* App. at 35. The sole exception was plaintiffs' trespass claim, which on plaintiffs' motion was dismissed with prejudice after plaintiffs admitted they could not prove any trespass.

[7] December 18, 1986 Opinion of the Court of Appeals, *Pawtuxet Cove Marina, Inc. v. CIBA-GEIGY Corp.*, 807 F.2d 1089, 1091 (1st Cir. 1986); App. at 3.

[8] December 18, 1986 Opinion of the Court of Appeals, 807 F.2d at 1094; App. at 9-10. The Court of Appeals also held that there was no abuse of discretion by the District Court when it denied plaintiffs' August 1985 motion to amend based on the spill incidents. 807 F.2d at 1094; App. at 10-11.

REASONS FOR DENYING THE PETITION

A. Plaintiffs Should Not Be Entitled to Relitigate in This Court Their View of the Factual Circumstances of The Case, Where That View Was Repeatedly Rejected by the Courts Below as Wholly Unsupported.

Plaintiffs base their Petition for *Certiorari* entirely on supposed errors of fact made by the courts below, as to both the citizen suit issue and the common law claims. These assertions, even if colorable (and they are not), do not suffice to support a Petition for *Certiorari.*

1. *The Citizen Suit Claim.*

The body of plaintiffs' Petition does not appear to challenge the legal conclusion of the courts below that no action will lie under Section 505 unless it is one to abate ongoing violations. As plaintiffs frame the citizen-suit issue in their Petition for *Certiorari,* the "circuit court ignored the fact there were ongoing violations" of CIBA-GEIGY's NPDES permit.[9]

It is settled practice that this Court does "not grant a [writ of] *certiorari* to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925).

Moreover, it is clear that the courts below correctly found that plaintiffs did not—and could not—allege an ongoing violation of CIBA-GEIGY's NPDES permit at the time the action was commenced (or thereafter). The plaintiffs' Complaint, Amended Complaint, and Second Amended Complaint each failed to allege that CIBA-GEIGY was "in violation" of an effluent standard or limitation in a permit "in effect."

Plaintiffs' Petition for *Certiorari,* however, cites the existence of violations "after the petitioners had filed the requisite statutory notice," though not as of the time

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[9] Petition for *Certiorari* at 7.

the action was commenced.[10] This argument tracks plaintiffs' August 1985 motion to amend based on purported "ongoing violations," which was rejected by the District Court. The District Court held that "the fourth attempt by the plaintiffs to inject the (phantom) ongoing violation issue into the case . . . comes too late and clearly bears the hallmark of yet another exercise in abject futility." App. at 31. The Court of Appeals agreed. 807 F.2d at 1094; App. at 10-11.

The plaintiffs now attempt to argue that the courts below should have presumed that violations of CIBA-GEIGY's NPDES permit were ongoing and that plaintiffs would be able to prove a likelihood of continued violations.[11] This position has no support in law, and is contrary to the facts as found by the courts below.

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[10] The purported "violation" referred to in the Petition for *Certiorari*, at 4, was a minor "spill" of pretreated wastewater being transported between the CIBA-GEIGY plant and the Cranston municipal wastewater works. The spill did not contain any reportable quantity of any substance; was not a violation of any NPDES permit which was in effect; and is separately regulated under Section 311 of the Clean Water Act governing spills (and therefore not properly the subject of a citizen suit under Section 505). In any event, it occured prior to the commencement of this action with no likelihood of recurrence. *See* December 18, 1986 Opinion of the Court of Appeals, 807 F.2d at 1094; App. at 10-11.

[11] Plaintiffs also state, somewhat plaintively, that "[n]ot doing so, both courts should have allowed petitioners leave to amend the complaint so as to allow them to conform to the court's new interpretations of the statute." Petition for *Certiorari* at 8. Though the court's interpretation merely tracked the plain language of the statute, the District Court did allow plaintiffs leave to amend following its May 17, 1984 ruling. App. at 17. Plaintiffs were unable, consistent with the District Court's instruction that any amendment "comply fully with the mandate of Fed. R. Civ. P. 11," *Id.*, to amend the Complaint to allege ongoing violations. The District Court again dismissed the Clean Water Act count on September 10, 1984, and denied a motion for reconsideration on June 7, 1985. As the Court of Appeals found, there was no abuse

2. *The State Common Law Claims.*

As regards the granting of summary judgment on the state common law issues, plaintiffs base the entirety of their argument in this Court on an alleged misreading of the evidence by the District Court and the Court of Appeals. As the District Court noted, on motion for summary judgment, CIBA-GEIGY presented "a pot-pourri of materials" from the "voluminous record" in the case negativing plaintiffs' contentions of proximate and actual causation; in response, plaintiffs "offered nothing but the merest of vellieties: they eschew any present tender of proof, but mouth empty assurances that they will (somehow) prove the 'but for' connection at a trial. Such generalized assurances are manifestly insufficient to blunt the blade of a properly-honed Rule 56 axe." [12] Plaintiffs simply did not come forward with any showing sufficient to resist CIBA-GEIGY's properly-supported motion for summary judgment.[13] The District Court clearly evaluated plaintiffs' claims in an appropriate light.[14] So did the Court of Appeals.

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of discretion when the District Court rejected yet another attempt to introduce the issue in August of 1985. 807 F.2d at 1094; App. at 11.

[12] September 19, 1985 Memorandum Decision of the District Court, App. at 26. At trial, plaintiffs admitted that they were unable to offer any additional evidence, beyond their assertions in opposition to summary judgment, bearing on the causal connection between CIBA-GEIGY's discharges and the lack of dredging of Pawtuxet Cove. See the District Court's order, App. 35.

[13] *See Celotex Corp. v. Catrett*, —— U.S. ——, 106 S.Ct. 2548 (1986). CIBA-GEIGY submitted with its motion a statement of facts drawn from plaintiffs' own allegations in their various pleadings, plaintiffs' sworn deposition testimony, plaintiffs' sworn answers to interrogatories, plaintiffs' documents provided in discovery, and certified copies of official records of the United States Army Corps of Engineers (the agency in charge of dredging projects).

[14] "[T]he plaintiffs have failed to offer a fact-based predicate, *sufficient, even when examined in the light most favorable to the*

Plaintiffs' Petition for *Certiorari*—as to both the citizen suit claim and the state common law issues—presents primarily "a question of fact, which does not merit Court review." *National Labor Relations Board v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (dismissing writ of *certiorari* as improvidently granted). This Court consistently has been unwilling to disturb such lower court determinations, particularly where, as here, the District Court and the Court of Appeals reach identical conclusions.[15]

B. Citizen-plaintiffs May Not Maintain an Action Under Section 505 of the Clean Water Act Against a Former Industrial Discharger Where, As Here, the Former Discharger Is Not and Cannot Be Alleged To Be "in violation" of an Effluent Standard or Limitation Contained in a Permit That Is "in effect" Under the Clean Water Act.

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, permits an action against any person "who is alleged to be *in violation* of" an effluent standard or limitation, which is defined to include a permit "which *is in effect*" under the Act. Section 505(a)(1), (f)(6) (emphasis added). Jurisdiction is conferred on the district courts to enforce the effluent limitations in the permit and as ancillary relief to apply "appropriate" civil penalties. Section 505(a).

No allegation of continuing or recurring violations was or could be made in this case; no permit for the discharge

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plaintiffs, to support the conclusion that the Cove would have been dredged but for [CIBA-GEIGY's] shortcomings. In the absence of any genuine issue of material fact on the issue, the defendant is plainly entitled to *brevis* disposition as a matter of law." September 19, 1985 Memorandum Decision of the District Court, App. at 26 (emphasis supplied).

[15] *See, e.g., United States v. Doe*, 465 U.S. 605, 613-14 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

of process wastewater was in effect, and no possibility of continuing or indeed any future violation existed. The Court of Appeals for the First Circuit undertook an extensive examination of the language, history, and purpose of the citizen suit provision of the Clean Water Act, and correctly concluded that it did not reach the conduct of CIBA-GEIGY in the case at hand.

Plaintiffs urge that *certiorari* should be granted in this case because the decision below of the Court of Appeals for the First Circuit conflicts with the decision of the Court of Appeals for the Fourth Circuit in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *cert. granted*, —— U.S. ——, 107, S.Ct. 872 (1987), pending before this Court as No. 86-473.[16] This Court is already addressing the issue of statutory construction presented here in the *Gwaltney* case, and need not review this case to resolve the purely legal question.

Moreover, the defendant in *Gwaltney* and CIBA-GEIGY in this case are in fundamentally different factual circumstances.[17] In *Gwaltney*, though the alleged violations had ceased at the time the action was commenced, the defendant continued to discharge process wastewater pursuant to an NPDES permit which was in effect. In contrast, in this case: (i) no permit was "in effect" at time of suit; (ii) no future violations of a

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[16] The decision below in this case is consistent with *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). In *Hamker*, no NPDES permit ever existed and the alleged "violation" was a one-time incident. In *Pawtuxet Cove*, all process wastewater discharges pursuant to the NPDES permit had ceased prior to suit, and there was no ongoing pollution to be abated.

[17] In a case more closely analogous to the present one, *i.e.*, where the discharger "has ceased or will shortly cease the operations at issue here and will abandon its relevant discharge permits," the Court of Appeals for the Fourth Circuit dismissed the appeal of a citizen suit under Section 505 as moot. *Chesapeake Bay Foundation v. American Recovery Co.*, 769 F.2d 207, 209 (4th Cir. 1985).

permit were possible because process wastewater discharges had ceased, and (iii) plaintiffs did not—and repeatedly remained unable to—allege any continuing violation.

The Fourth Circuit in *Gwaltney* did not have occasion to examine the combined effect of Section 505(a)(1) and Section 505(f)(6), since Gwaltney's permit was still "in effect" although not being violated at the time suit was commenced. This Court's decision in *Gwaltney* will necessarily be limited to construction of the statutory term "in violation" in Section 505(a)(1) and will not alter the decision in this case where no permit is "in effect" within the meaning of Section 505(f)(6). Thus, even if this Court should decide in *Gwaltney* that civil penalties are available under Section 505 for purely past violations by a discharger who continues to operate under an NPDES permit, that decision would not necessarily alter the outcome of this case against a former discharger. Regardless of the outcome in *Gwaltney*, there is no need for the Court to review the decision in this case.

CONCLUSION

The Petition for *Certiorari* should be denied.

Respectfully submitted,

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